Supreme Court, U.S.
FILED
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No. 90-1413

In The

Supreme Court of the United States

October Term, 1990

DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA AND VICINITY, AFL-CIO, an unincorporated association, and Iron Workers Local Union No. 378, an unincorporated association,

Petitioners,

v.

CAMPING CONSTRUCTION COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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April 1991

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QUESTIONS PRESENTED

1. DOES THE COURT, RATHER THAN AN ARBITRATOR, HAVE THE OBLIGATION UNDER FEDERAL LABOR LAW AND POLICY TO DETERMINE WHETHER A COLLECTIVE-BARGAINING AGREEMENT ARISING UNDER SECTION 8(f) OF THE NATIONAL LABOR RELATIONS ACT, AND EXECUTED AND REPUDIATED PRIOR TO THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD IN *JOHN R. DEKLEWA & SONS*, 282 N.L.R.B. 1375 (1987) *ENF. SUB. NOM. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 3 V. N.L.R.B.*, 843 F. 2d 70 (3rd CIR.), CERT. DEN. 488 U.S. 889 (1988) HAS BEEN REPUDIATED, OR CONTINUES TO EXIST?

LIST OF PARTIES

1. The names of the parties to this proceeding are those contained in the caption to this case.

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OPINIONS BELOW

The relevant opinions below are set forth at page 2 of Petitioners' Iron Workers Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 90-1413. ("Petition").

JURISDICTION

The relevant jurisdictional history is set forth at Petition, page 2. The Petition was received on March 11, 1991. This opposition is timely filed under 28 U.S.C. § 2101 and Rule 12 of the Court.

STATUTES INVOLVED

The relevant statutory provisions are set forth at Petition, page 3 and Appendix H.

STATEMENT OF THE CASE

On September 16, 1987, Camping Construction Company ("Camping") filed a Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the Northern District of California, invoking the jurisdiction of that Court under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185. The Complaint sought the intervention of the District Court in a dispute over whether the conduct of either Camping or the Unions negated the continued existence of a collective-bargaining agreement and the continued vitality of

the arbitration provisions thereof. Camping contended that if there was no collective-bargaining contract extant between the parties, then *a fortiori* there was no agreement to arbitrate disputes arising out of events occurring subsequent to that contract's demise.

The facts were not in dispute. In 1978 Camping executed a pre-hire memorandum agreement with the Petitioners, District Council of Iron Workers and Iron Workers Local 378. The master agreement to which the memorandum agreement referred contained grievance and arbitration provisions and a termination date of June 30, 1980. The Unions notified Camping of their desire to modify the agreement on February 21, 1980, thus triggering the termination of the collective-bargaining agreement on June 30, 1980, or so Camping contended. Camping, in reliance upon that position, did not comply with the agreement's provisions after June 30, 1980, and believed that its open and notorious failure to do so was known to the Unions, which began to picket Camping at jobsites within their jurisdiction.

Seven years later, however, the Unions sought to invoke the grievance and arbitration provisions of the then current Master Labor Agreement, a collective-bargaining agreement to which Camping had never assented. Grievances filed by the Unions alleging violations of that agreement's provisions were premised upon Camping's failure to have used the Unions' members on Camping's construction projects in 1987, and were scheduled for arbitration before the Board of Adjustment provided for in that Master Labor Agreement.

Since the existence of an agreement to arbitrate disputes is for a court, not an arbitrator, to decide, Camping sought to have the District Court review whether it was bound to arbitrate the asserted grievances of the Unions, and to stay the scheduled arbitration proceedings pending such review.

The District Court, at Camping's request, issued a Preliminary Injunction staying arbitration proceedings pending final disposition of the issue before the Court as to whether Camping was bound to a contract calling for arbitration of disputes. It is the propriety of the issuance of that injunction which is at issue in the Cross Petition for Certiorari being filed by Camping in conjunction with this Opposition.

Although the District Court subsequently granted summary judgment for the Unions – concluding that the question of the collective-bargaining agreement's termination, lawful repudiation, and very existence was for the arbitrator to determine – the U.S. Court of Appeals for the Ninth Circuit partially disagreed. It held (1) the issue as to the "termination" of the agreement was for the arbitrator, (2) the issue as to the lawful repudiation of the Section 8(f) pre-hire collective-bargaining agreement was for the District Court to decide, but (3) the District Court could not issue an order staying arbitration proceedings without full compliance with the provisions of the Norris-LaGuardia Act, 29 U.S.C. §§101-115.

Petitioners have requested certiorari on the second of these three issues, as to whether the court, not an arbitrator should properly decide whether an *otherwise lawful* pre-*Deklewa* repudiation occurred, framed, as an implicit

condition predicate, in terms of a generalized request for review by the Court of the underlying issue of retroactive application of *Deklewa*.

REASONS FOR DENYING THE WRIT

I. THE ISSUE OF *DEKLEWA* RETROACTIVITY IS NOT BEFORE THE COURT IN THIS CASE BUT SHOULD THE COURT DEEM PLENARY REVIEW PROPER SUCH REVIEW SHOULD INCLUDE THE MERITS OF THE ADOPTION OF AND DEFERRAL BY THE COURT TO THE BOARD'S "LAW CHANGING" DECISION IN THAT CASE

Petitioners raise no real issue that may be determined by the Court without revisiting either the no-retroactivity rule of *Mesa Verde*[1] and the substantive validity of the decision of the National Labor Relations Board in *Deklewa*.[2] Prior to *Deklewa*, the Board, the Circuits and the Court all considered repudiation an integral characteristic of section 8(f) agreements. Absent *Deklewa*, it is plain that repudiation rights are not grievable because no arbitration obligations can arise from a contract that does not exist. The Board's construction of the Act, adopted by the

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[1] *Mesa Verde Construction v. Northern California District Counsel of Laborers*, 885 F.2d 594 (9th Cir.), *cert. den.*, ___ U.S. ___, 59 U.S.L.W. 3250 (1990).

[2] *John R. Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enf. sub. nom. International Association of Bridge Structural & Ornamental Ironworkers, Local 3 v. N.L.R.B.*, 843 F.2d 70 (3d Cir. 1988), cert. den. 488 U.S. 889 (1988).

Court in *McNeff*[3] and the Ninth Circuit in *Ion Construction*,[4] and affirmed in *Interstate Distributor Co.*[5] and *Camping*, gives no hint of any controversy whatsoever on *this* issue.

The decision below simply confirms that since pre-*Deklewa* repudiations under 8(f) agreements are not grievable, the Court retains primary jurisdiction to determine whether repudiation has occurred. Factually it is no different from that presented in *Mesa Verde* save that the issue of repudiation has not yet been decided by a District Court. The issues of retroactivity were fully briefed in *Mesa Verde* and Petitioners' brief herein adds no new arguments.[6] *Deklewa* retroactivity is simply not before the Court in this case, and for that reason is not ripe for decision. Should the Court deem plenary review justified, Camping respectfully requests that the Court exercise the same discretion with respect to the Questions Presented in the Cross-Petition previously filed in *Mesa Verde*, on the merits of the adoption of and deferral by the Court to the Board's "law changing" decision in *Deklewa*.[7]

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[3] *Jim McNeff v. Todd*, 461 U.S. 260, 103 S. Ct. 1753 (1983).

[4] *Ion Construction v. District Council of Painters No. 16*, 803 F.2d 1050 (9th Cir. 1986).

[5] *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distributor Co.*, 832 F.2d 507 (9th Cir. 1987)

[6] A copy of the Response filed by Mesa Verde on the issue of retroactivity is attached herein as Appendix "A" for the convenience of the Court in assessing the underlying merits of Petitioners' request for plenary review.

[7] For the convenience of the Court, the Cross Petition in *Mesa Verde Construction Co. v. Northern California District Council of Laborers, et al.*, Case No. 89-1874 is reproduced at Appendix "B".

II. NO CONFLICT EXISTS WITH THE PRIOR DECISIONS OF THE COURT ON THE ISSUE OF ARBITRABILITY OF DISPUTES

Similarly, no substantive conflict exists with respect to the presumption in favor of arbitrability of contractual disputes. That presumption, which has its genesis in the willing agreement of contracting parties, depends on the statutory framework that governs their substantive conduct. In purporting to rely on that presumption, Petitioner is simply missing – or obscuring – the point. Rights arising under federal enactments, whether it be federal antitrust doctrine,[8] securities law[9] or federal labor law, are specific to those enactments and their own unique policy considerations. The scope of any presumption as to the "arbitrability" of statutory rights is for Congress and the Court to determine. The issue is not whether as a generalized proposition, because they are of statutory origin, rights so created are, *a fortiori*, not arbitrable, but whether the particular statutory right of repudiation is consistent with the statutory scheme set forth in section 8(f) of the National Labor Relations Act.[10]

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[8] See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

[9] *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

[10] 29 U.S.C. 158 (f). The independent non-arbitrable character of a section 8(f) repudiation is not premised on the inviolability of the labor agreement or any supposed generalized immunity from arbitration. To the contrary, the Court has, in cases ranging from the *Steelworkers Trilogy* (*Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v.*

(Continued on following page)

The substantive issues of uniform application of federal statutory law advanced by Petitioner simply do not arise and no certworthy issue is presented. The myth of immortality vested in the right of repudiation by Petitioner by virtue of the automatic renewal of construction industry collective-bargaining agreements does not coincide with the harder realities of the Ninth Circuit's decision in *Mesa Verde*, which forecloses the possibility of reasonable reliance on the right to repudiate in either Board doctrine or Ninth Circuit law. Indeed, if repudiation does have continued viability after *Mesa Verde*, it can only exist if the Court chooses to revisit that decision on the merits.

(Continued from previous page)

Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)) to *AT&T Technologies* (*AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986), acknowledged the traditional role of arbitration in the processing of grievances arising under labor agreements. Issues of contract formation, termination and, especially, repudiation are quite another matter. The abuse of discretion lies in the unfounded belief that repudiation is grievable in the first instance, not in the rectification of that error by a district court. *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 598 F.Supp. 1092 (N.D. Cal. 1984)

CONCLUSION

For all the foregoing reasons, Camping respectfully submits that this Petition for Writ of Certiorari should be denied. However, should the Court believe that the issues warrant plenary review, Camping respectfully urges the Court to grant the Cross-Petition for Writ of Certiorari filed herewith.

Respectfully submitted,

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April 1991

APPENDIX A

No. 89-1661

In The

Supreme Court of the United States

October Term, 1989

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, AND CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,

Petitioners,

v.

MESA VERDE CONSTRUCTION CO.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit after remand from the *en banc* Court (Pet. App. A) is reported at 885 F.2d 594. The Opinion of the *en banc* Court (Pet. App. B) filed November 15, 1988 is reported at 861 F.2d 1124. The Opinion of the original three-judge panel of the United States Court of Appeals for the Ninth Circuit (Pet. App. C) filed June 23, 1987 is reported at 820 F.2d 1006. The Decision of the United States District Court for the

Northern District of California (Pet. App. D) filed December 13, 1984 is reported at 598 F. Supp. 1092. The Order of the United States District Court for the Northern District of California denying the Motion for Alteration, Amendment or Vacation of Order (Pet. App. E) filed February 11, 1985 is reported at 602 F. Supp. 327.

JURISDICTION

The Judgment and Opinion of the original three-judge panel of the United States Court of Appeals for the Ninth Circuit was entered on June 23, 1987. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was filed and granted. The Decision of the *en banc* Court reversing the earlier Opinion and remanding the case to the three-judge panel to determine the question of retroactivity was filed on November 15, 1988. The Decision of the three-judge panel after remand was filed on September 13, 1989. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was filed on September 27, 1989. On January 26, 1990, the Petition for Rehearing was denied, and the Suggestion for Rehearing *en banc* was rejected, and the Order of the three-judge panel was amended.

The jurisdiction of the Court has been invoked under 28 U.S.C. § 1254(1). The Petition was timely filed with the Court under 28 U.S.C. § 2101(c), and this Response is filed pursuant to the Request of the Court.

STATUTES INVOLVED

The relevant statutory provisions are:

A. National Labor Relations Act, as amended, Section 8(f), 29 U.S.C. § 158(f).

B. Labor-Management Relations Act of 1947, as amended, Section 301, 29 U.S.C. § 185.

Pertinent portions of these statutory provisions are reproduced at Pet. App. F.

STATEMENT OF THE CASE

The Northern California District Council of Laborers ("Laborers") and the Carpenters 46 Northern California Counties Conference Board ("Carpenters") are labor organizations within the meaning of the National Labor Relations Act of 1947, as amended (hereinafter "NLRA"), 29 U.S.C. § 152(d). Mesa Verde Construction Company ("Mesa Verde") is an employer primarily engaged in the construction industry within the meaning of § 8(f) of the NLRA, 29 U.S.C. § 158(f).

In 1979, Mesa Verde entered into its first collective bargaining agreement with the Laborers, and signed an additional collective bargaining agreement with the Laborers on June 26, 1980. On November 17, 1982, Mesa Verde and the Laborers agreed in writing that their 1980 contract would continue in effect until June 15, 1986.

Mesa Verde first entered into a collective bargaining agreement with the Carpenters in August, 1979. Through a subsequent agreement executed in June, 1980, Mesa

Verde accepted the new June 16, 1980 to June 15, 1983 Carpenters Master Agreement. On September 8, 1982, Mesa Verde and the Carpenters entered into an early extension of the agreement to June 15, 1986.

Despite the fact that the agreements with both unions were to remain in effect until June 15, 1986, Mesa Verde, by way of letters, informed the Unions of its intent to abrogate or repudiate its collective bargaining agreements in May of 1984. At the time, Mesa Verde was working on a project in Hercules, California, at which it employed members of both Unions.

In late May or early June of 1984, Mesa Verde began work on *another* project employing non-union workers.

Both unions filed grievances against Mesa Verde and requested arbitration over Mesa Verde's contractual obligations on the *new* project. Mesa Verde brought suit under Section 301 of the LMRA, 29 U.S.C. § 185, against both Unions seeking a declaratory judgment that it need not comply with the Agreements with respect to projects begun after its repudiation of the Agreements. The District Court stayed the arbitrations pending resolution of the declaratory judgment action and later granted Mesa Verde summary judgment against both Unions.

The District Court concluded that Mesa Verde was a "project by project" employer, and that neither Union had "majority" support in the relevant units, *i.e.* the new projects. The Court held that the collective bargaining agreements at issue were "pre-hire" agreements authorized by § 8(f) of the NLRA and that Mesa Verde's May, 1984 letters were sufficient to repudiate the Agreements.

REASONS FOR DENYING THE WRIT

Summary of Argument

Although the issues underlying Petitioner's argument are important in the administration of the day-to-day relationships between construction unions and construction employers, those issues are not of such importance as to warrant the review of the Court.

The decision of the court below correctly analyzed whether the "law-changing" decision of the National Labor Relations Board ("NLRB") should be applied retroactively to the factual situation present in this case. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). Its decision rested upon settled principles of law.

Although "the general rule of long-standing is that the law announced in [a] Court's decision controls the case at bar," see *e.g., St. Francis College v. Al-Khazraji*, 481 U.S. 604, 608, 107 S.Ct. 2022, 2025 (1987), the Court has recognized that this general rule is subject to exception where, *inter alia*, substantial inequitable results would occur. See, *e.g., Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971).

Mesa Verde recognizes that among the members of the Court, there may be differences of opinion as to the continued viability of the Court's civil retroactivity doctrine, *e.g., American Trucking Associations, Inc., et al. v. Smith*, 495 U.S. ___, ___ S.Ct. ___ (June 4, 1990), but respectfully suggests that under the reasoning of either the plurality or dissent in that case, the outcome of this case would be the same. Hence, review of the "retroactivity" issues presented by Petitioner is unnecessary.

In its attempt to convince the Court otherwise, Petitioner has mischaracterized certain facts, and overemphasized the impact of the decision of the court below. It does not create the parade of horribles that Petitioner has suggested.

Finally, this case *does not* present a situation where there is a clear conflict among the Circuits on the precise issues presented.

ARGUMENT

A. The Court Below Correctly Concluded That Retroactive Application Of The NLRB's "Law-Changing" Decision in *John R. Deklewa & Sons, Inc.* To The Parties In This Case Was Unwarranted.

The *Chevron Oil v. Huson* test to determine whether a decision should *not* be given retroactive effect – a test which apparently still commands support of the plurality of the Court – has three parts, which may be summarized as follows:

1. whether the "law-changing" decision is one of first impression, or overrules clear past precedent;
2. whether retrospective operation of the law-changing decision would further or retard the operation of the rule in question;
3. whether retrospective application of the rule will impose substantial inequitable results.

Application of these three factors to the situation here reveals the correctness of the decision of the court below.

First, the "repudiation" rule applicable to Section 8(f) pre-hire contracts, previously grounded in NLRB precedents, see *e.g., D'Angelo & Kahn, Inc.*, 248 NLRB 396 (1980), was clearly overruled by the NLRB in *John R. Deklewa & Sons, Inc.*, 282 NLRB No. 184 (1987). The Ninth Circuit, which itself had previously adopted the "repudiation" rule as the law in its Circuit, see *e.g., United Bhd. of Carpenters & Joiners Local 2247 v. Endicott Enters.*, 806 F.2d 918 (9th Cir. 1986), clearly "overruled" its own past precedents on this subject in its *en banc* decision below.

The pre-*Deklewa* law concerning a party's *ability* to repudiate a pre-hire agreement during its term was abundantly clear, even if the law as to all of the types of *methods* to accomplish it was not. The "law-changing" decision involved here – either the NLRB's decision, or that of the Ninth Circuit's *en banc* panel – overturned the clear past precedent as to the employer's *ability* to repudiate such agreements. Under the NLRB's holding in *Deklewa*, neither a union nor an employer has the *ability* to lawfully repudiate a pre-hire agreement during its unexpired term; the question of the proper *method* to accomplish such a repudiation has become irrelevant.

Second, retrospective operation of the new "non-repudiation" rule endorsed by the majority of the *en banc* Court below would not further "employee free choice" or "labor relations stability". The practical effect of retroactivity of the new "non-repudiation" rule of the NLRB and Ninth Circuit would be to judicially impose a collective-bargaining representative upon the "non-union" workers employed by Mesa Verde on the projects at issue (Pet. p.

4), thereby currently depriving them of any free choice as to a bargaining representative, and depriving them of the ability they may have had six years ago to renounce the Union as their representative through an NLRB election.

Moreover, contrary to Petitioner's suggestions (Pet. p. 7), "labor relations stability" is fostered, not retarded, when the parties to a collective-bargaining relationship – even one legitimated by Section 8(f) of the Act – enter into and live by the rules of such a relationship knowing their respective rights and obligations. Here, both the Unions and the Employer must be held to have known when they entered into their original relationship and subsequently lived by it that the pre-hire agreements were voluntary and voidable by either party. The Unions could not expect that such agreements were enforceable unless they became the majority bargaining representative at each new jobsite, *Dee Cee Floor Covering*, 232 NLRB 421 (1977), and the Employer must be held to have known that as long as the Union had "majority status", the Employer would not be permitted to ignore the agreement or the economic consequences of its voluntary execution. *NLRB v. Pacific Erectors, Inc.*, 718 F.2d 1459 (9th Cir. 1983).

Petitioner's stated fears of forum-shopping (Pet. p. 11) should not persuade the Court that a prospective application of the new rules will retard their operation. The issue is not whether the NLRB and the courts have different rules *today* for the parties to collective-bargaining relationships. Rather, the issue is whether a termination of the relationship, accomplished in full accord with the law at the time of the operative conduct, is to be

penalized by retroactive adoption of a new rule outlawing such termination. Nothing in the law would have prevented the Unions here from challenging Mesa Verde's repudiation of the collective-bargaining agreements in appropriate charges made to the NLRB in 1984 at the time of the operative conduct, or would have prevented the Unions from arguing to the NLRB that on the facts or the law, Mesa Verde had unlawfully terminated the collective-bargaining relationship. The Unions simply chose not to do so, and now complain that their failure to have done so should be remedied by retroactive application of rules which did not exist at the time. Petitioner's "forum shopping" fears are illusory ones, for all cases involving repudiation conduct after the date of the *Deklewa* decision will be governed by it, and only a few old situations will be governed by the prior rules.

As to the third prong of the *Chevron Oil* test – whether retrospective application of the rule will impose substantial inequitable results – the reliance interests of the parties clearly suggest that Mesa Verde, and other employers, who relied upon the fundamental principles of law developed under Section 8(f) and Section 8(a)(5) of the Act would be unfairly treated by retroactive application of a rule which not only changes their economic and administrative expectations, but also the length and character of their relationship with the Unions involved.

Here, the "grievances" of the Laborers and Carpenters deal with alleged violations of the collective-bargaining agreement which occurred *after*, not before, the repudiation of the agreement by Mesa Verde (Pet. App. 64a). The undisputed facts reveal that the Unions were not the freely-chosen majority bargaining representative

of the employees working at the construction projects begun *after* the May 8 and May 15 repudiations of the Carpenters and Laborers Agreements. (Pet. App. 84a, 100a)

The economic and administrative consequences of retroactive application of the new non-repudiation rule would be to impose upon Mesa Verde the financial burdens of labor costs not expected as to those projects, as well as the necessity to deal with the Unions as to all the "wages, hours and other terms and conditions of employment" of Mesa Verde's employees notwithstanding the "non-majority" status of those Unions. Retroactive application would likewise impose contractual arbitration clauses. A *voluntary* method of settling disputes – favored by the Court for precisely this reason – would become, with adroit judicial prestidigitation, *involuntary*.

This case was carried to judgment in the District Court on the basis of settled principles of law. Mesa Verde premised its repudiation conduct on rights grounded in applicable NLRB and Ninth Circuit precedent, see *Dee Cee Floor Covering, Inc., supra; NLRB v. Pacific Erectors, Inc., supra*. The case was litigated with the understanding of all concerned that the operative principles governing the parties conduct were clear.

The Court has recognized that the lower courts, when considering whether a "law-changing" decision should be applied retroactively, should look at the harsh and disruptive effects upon the litigants, and should be guided by the following principles: if the operative *conduct or events* occurred before the "law-changing" decision, a court should apply the law prevailing at the time

of the conduct; otherwise, the court should apply the new law. *American Trucking Associations, Inc. v. Smith, supra,* 495 U.S. at ___. Recognizing the reliance interests of the parties, that is what the Ninth Circuit has done in this case.

Mesa Verde's repudiation of the Laborers and Carpenters agreements occurred almost three years before the "law-changing" decision of the NLRB in *Deklewa.* Therefore, it was proper for the Ninth Circuit to affirm the District Court's entry of judgment which had applied the prior law to the conduct which occurred prior to the "law-changing" decision. This position is consistent with the Court's precedents in similar circumstances. See, *e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 88, 102 S.Ct. 2858 (1982) ("law-changing" decision not applied retroactively when to do so would have upset judgment entered prior to "law-changing" decision).

In sum, since the Ninth Circuit correctly evaluated the application of the *Chevron Oil* factors to this case, there is no overriding warrant for the Court to exercise its supervisory power and review the Ninth Circuit's analysis of the retroactivity issue.

B. There Is No Conflict In The Courts Of Appeals Which Warrants Resolution By The Court At This Time.

Petitioner suggests that the Ninth Circuit and the Third, Eighth and Seventh Circuits are in conflict as to whether the NLRB's decision in *Deklewa* should be applied retroactively. Although it is true that the Third, Eighth, and Seventh Circuits have seen fit to defer to the

NLRB's conclusion that the new non-repudiation rules should apply retroactively to pending NLRB cases, see, *Ironworkers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988); *NLRB v. W.L. Miller Co.*, 871 F.2d 745 (8th Cir. 1989); *NLRB v. Bufco Corp.*, ___ F.2d ___ (7th Cir. 1990), no Circuit Court is in conflict with the Ninth Circuit on the application of such a rule in cases arising under Section 301 of the LMRA, 29 U.S.C. § 185.

Whatever may be said of the correctness of the non-repudiation rule adopted by the NLRB in *Deklewa*, the "law changing" decision of the NLRB was premised upon administrative convenience to overcome the NLRB's perceptions of the evidentiary problems in litigation of unfair labor practices. The NLRB's unfair labor practice decisions do not always formulate the rules for the enforcement of collective-bargaining agreements under Section 301. Indeed, that dichotomy was foreseen by the Court in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 103 S.Ct. 1753 (1983). There, the Court concluded that although a Section 8(f) pre-hire agreement may form the basis of a breach of contract claim under Section 301 even if the Union does not represent a "majority" of the employees in the relevant unit, such a contract does not obligate the employer to "bargain" with the Union under penalty of an unfair labor practice. *Jim McNeff, Inc. v. Todd, supra; John R. Deklewa and Sons, Inc., supra.*

It would not be improper to have as a matter of federal labor policy a divergence in the law under different Sections of the Labor Act concerning the enforceability of pre-hire agreements. Since the unfair labor practice Sections of the Act, and Section 301 serve different purposes, *Jim McNeff, Inc. v. Todd, supra,* it is not necessary for the Court to fashion rules so as to create

identical results under them. Given such, it is not necessary for the Court to review the "retroactivity" analysis of the Ninth Circuit here simply to attempt to square the results in the two different lines of cases – unfair labor practices cases, and Section 301 breach of contract cases.

C. Even If The Court's Civil Retroactivity Doctrine Were To Be Applied Simply As A Remedial One, The Equitable Balance In This Case Tilts In Favor Of Upholding The Decision Below.

One of the functions of the Court is to construe statutes, determining the meaning of them as Congress intended. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984). Although in reviewing an administrative agency's interpretation of the statute it is charged with enforcing, the Court may apply a deferential test of "reasonableness", the judiciary still is obligated to and does exercise its function with an eye on what Congress intended to be the law governing the rights and obligations of the parties regulated by those statutes. *Id.*

As Mesa Verde has set forth in its Cross-Petition For Writ of Certiorari, No. 89-1874, the Ninth Circuit's *en banc* decision here gave almost blind deference to an administrative agency which changed its mind about what rules were "workable" and about the proper Congressional intent behind two interrelated Sections of the Labor Act. Contrary to the Ninth Circuit, the question before it in this case was not whether the Court's decision in *McNeff* can be read as supporting the Board's decision in *Deklewa*, but rather whether the Labor Act's provisions themselves can support *Deklewa*. As Justice Scalia has

stated: "We defer to agencies, however (and thus apply a mere "reasonableness" standard of review) in their construction of their statutes, not of our opinions." *NLRB v. IBEW, Local 340*, ___ U.S. ___, 107 S.Ct. 2002, 2015 (1987) (Scalia, J., dissenting).

Even so, the extent that both the NLRB and the Ninth Circuit have appropriately changed the law in their respective jurisdictions so that now Mesa Verde's lawful repudiation of its pre-hire agreement would be unlawful, the question remains as to the remedy. If the dissent's view in *American Trucking Associations, Inc. v. Smith, supra*, is applied here, this new rule would be applied retroactively to the facts of this case, leaving it to the lower courts to determine the remedy to be enjoyed by the Unions. Here the suit was one for declaratory, not monetary, relief, so that a limitation on the scope of recovery would be inappropriate.

However, the reliance interests of the parties suggest that the Unions are entitled to no relief. The parties' relationship was governed by the applicable NLRB precedent, applicable Circuit Court precedent and the Court's decisions. The conduct of Mesa Verde in repudiating its Agreements with the Laborers and Carpenters was premised upon the intent of Congress that pre-hire agreements were to be "voluntary", *Jim McNeff, Inc. v. Todd, supra*, and the practical realities that minority Unions in the construction industry were treated differently by Congress when it enacted Section 8(f) in 1959. *Id.*

Principles of equity eschew reliance on rigid application of technical rules, and it is precisely for this reason

that the Court adopted its *Chevron Oil* retroactivity doctrine. Mesa Verde relied upon the law as it existed in 1984 to repudiate its contracts. The Unions chose not to challenge such conduct as an unfair labor practice, but chose to litigate the matter to judgment under that law. It seems unquestionable that the conduct of Mesa Verde, once lawful, cannot be made unlawful by changes in the law it had no hand in shaping, changes it could not have foreseen in light of the Court's decision in *McNeff*.

The Ninth Circuit correctly rejected rigid adherence to the new rule, and balanced the equities concluding that the Unions here were entitled to no relief, albeit doing so by application of the civil retroactivity principles of *Chevron Oil*. That equitable balancing in the form of viewing the matter as one of remedy results in the same conclusion.

Hence, assuming *arguendo* the correctness of the Ninth Circuit's deference to the NLRB and its adoption of *Deklewa* as the law of that Circuit, the outcome of this matter should have been, and should be that the Unions are not entitled to enforce the repudiated pre-hire agreement.

D. Should The Court Grant Review Of The Ninth Circuit's Retroactivity Decision, The Court Should Also Review The Underlying "Law-changing" Decision On Its Merits.

Although the retroactivity issues presented by Petitioner do not warrant review by the Court, Mesa Verde respectfully suggests that the Ninth Circuit has erred in not following the Court's decision in *Jim McNeff, Inc. v.*

Todd, supra. There, the Court clearly stated that Section 8(f) pre-hire agreements were voidable and capable of unilateral repudiation until the Union achieved majority status in the relevant unit, but were fully enforceable under Section 301 of the LMRA, 29 U.S.C. § 185, absent such repudiation. That the NLRB, an administrative agency, has concluded that such a rule is now "unworkable", or that the Ninth Circuit shares such a view, is no excuse for either to ignore the applicable precedent of the Court. As the Court stated only recently: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas, et al. v. Shearson/American Express, Inc.*, 490 U.S. ___, ___, 109 S.Ct. 1917, 1922 (1989).

The Court of Appeals below did not respect that admonition, which clearly was applicable here. It is for this reason that Mesa Verde has sought the Court's plenary review of the entire Section 8(f) – Section 8(a)(5) ruling of the NLRB in *Deklewa*. See, Cross-Petition for Writ of Certiorari, in No. 89-1874. Unless the Court either "overrules" its *McNeff* decision, or "overrules" the Ninth Circuit *en banc* decision here, litigants can not know whether their conduct past or future will expose them to Sec. 301 liability.

Mesa Verde suggests that the Court's decision in *McNeff* rested upon sound reasoning, and carefully balanced union-employer-employee rights in the construction industry. Respect for the principles of *stare decisis* suggests that the Court should not tamper with the rules

formulated in *McNeff*. Such principles also suggest that the Ninth Circuit's deferential adoption of the non-repudiation rule of *Dekleuva* was unsound and contrary to law.

CONCLUSION

For all the foregoing reasons, Mesa Verde respectfully submits that this Petition for Writ of Certiorari should be denied.

However, should the Court believe that the issues herein warrant plenary review, Mesa Verde respectfully urges the Court to grant the Cross-Petition for Writ of Certiorari in No. 89-1784, and review the underlying questions of the correctness of the Ninth Circuit's *en banc* "law-changing" decision.

Respectfully submitted,

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July 1990

APPENDIX B

No. _____

In The

Supreme Court of the United States

October Term, 1989

MESA VERDE CONSTRUCTION CO.,

v. *Cross-Petitioner,*

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, AND CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mesa Verde Construction Company ("Mesa Verde") petitions for a Writ of Certiorari to review the Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 26, 1990.

OPINIONS BELOW

The relevant opinions below are set forth at page 2 of Petitioners' Laborers' and Carpenters' Petition for a Writ

of Certiorari to the United States Court of Appeals for the Ninth Circuit in the connected case of Northern California District Council of Laborers, and Carpenters 46 Northern California Counties Conference Board v. Mesa Verde Construction Co., No. 89-1661 ("Petition") and Appendices A-E thereto.

JURISDICTION

The relevant jurisdictional history is set forth at Petition, page 2. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The Petition was received on April 30, 1990. This Cross-petition is timely filed under 28 U.S.C. § 2101 and Rule 12.3 of the Court.

STATUTES INVOLVED

The relevant statutory provisions are set forth at Petition, page 2 and Appendix F, with the addition, herein and at Appendix A, of the following:

A. National Labor Relations Act, *as amended*, section(s) 8(a)(5); 8(b)(3); 8(b)(7)(C); 9(a) and 10(b) [29 U.S.C. §§ 158(a)(5); (b)(3); (b)(7)(C); § 159(a) and § 160(b)]

STATEMENT OF THE CASE

The factual statement of this case is fairly set forth in the Petition for Certiorari and in the opinion below.

REASONS FOR GRANTING THE WRIT

More important than the issues of labor law presented by the instant case, the question raised below is

the responsibility of the National Labor Relations Board to follow the decisions and statutory interpretations of the United States Supreme Court, and the role of federal appellate courts in deferring to the NLRB in cases of conflict between the Supreme Court and the NLRB's current opinion. The Courts of Appeal for the Ninth, Third, Seventh and Eighth Circuits[1] have abandoned the traditional balance between the judiciary and the courts by adopting a decision of an administrative agency that purports to overrule Supreme Court precedent and clear statutory construction in the name of administrative convenience. Judge Kozinski, writing in dissent in *Mesa Verde*, en banc, ends his analysis by noting "I can only hope that the Court will have occasion for sober reflection on the wisdom of the approach taken by our court today and by the Third Circuit in *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir.), cert. denied, ___ U.S. ___, 109 S.Ct. 222, 102 L.Ed.2d 213 (1988)." The elegiac elegance of Judge Kozinski's plea merits just such consideration by the Court, and, accordingly, it is on those terms that prayer for plenary relief is made.

The Cross-Petition For Certiorari Should Be Granted Because The Decision Of The Court Of Appeals For The Ninth Circuit Directly Conflicts With The Holding And Opinion Of The Court.

In 1977, General Counsel for the National Labor Relations Board argued to the Court in its brief to the United

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[1] *NLRB v. W.L. Miller Co.*, 871 F.2d 745 (8th Cir. 1989); *NLRB v. BUFCO Corp.*, ___F.2d___, 1990 WL 37251 (7th Cir. 1990).

States Supreme Court in *NLRB v. Local Union No. 103, Int'l Assoc. of Bridge, Structural and Ornamental Iron Workers* (Higdon), No. 76-719 (October Term, 1976) that " . . . the language of section 8(f) and its relationship to other provisions of the Act reflect that *section 8(f) was not intended to relieve unions that are parties to pre-hire agreements from the obligation to achieve majority support before they can require an employer to honor such an agreement by means of section 8(a)(5). . . .* " [*Id.* at 23-24](emphasis added). While there were other arguable interpretations of Section 8(f) and its legislative history, the United States Supreme Court announced that the Board's position was essentially correct, and stated: "the pre-hire agreement is voidable and does not have the same stature as a collective bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer." 434 U.S. at 341. The Court affirmed the Board's decision that picketing to enforce a pre-hire agreement violated NLRA section 8(b)(7)(C) [29 U.S.C. section 158(b)(7)(C)], as "acceptable" and a "defensible construction of the statute." *Id.* at 341, 350. It is not "acceptable" for the Board to ignore the fact that the Supreme Court in *Higdon* upheld the Board based upon a review of the legislative history of section 8(f), and was not merely reiterating the Board's philosophy.

The Supreme Court embraced this logic and statutory interpretation in the context of a trust fund lawsuit under section 301 of the National Labor Relations Act [29 U.S.C. § 185] in the case of *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983). In *McNeff*, as in this case, the union brought suit under section 301 of the Labor Management Relations Act to enforce a pre-hire agreement. The Court unanimously

affirmed that an employer has an *"undoubted right* to repudiate a pre-hire agreement before the union attains majority support in the relevant unit. . . . " 461 U.S. at 270 (emphasis added). *See also Id.* at 271 ("a section 8(f) pre-hire agreement is subject to repudiation until the union establishes majority status"), *and see Woelke and Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 664 (1981) ("[the employers], if they do not have a stable workforce among whom the union has secured a majority, may be free to repudiate the agreement at any project which the union has not demonstrated that it represents the majority of their employees"). By emphasizing that the Court's jurisdiction derived from section 301, the Court drew a "critical distinction" between the Board's obligation to decide unfair labor practice charges and the Court's obligation to construe the enforceability of collective bargaining agreements under section 301. The Court noted that only the former had been addressed in *Higdon.* The latter was settled in *McNeff. Id.* at 267, *and* at 267 n. 7. See also *Thurston Motor Lines, Inc. v. Jordank, Rand, Ltd.,* 460 U.S. 533, 535 (1983); *Hutto v. Davis,* 454 U.S. 370, 375 (1982) (per curiam). Thus, the meaning of section 8(f) and its legislative history became the finding of the Court.

Only four years after the Court's opinion in *McNeff,* in the case of *John R. Deklewa and Sons, Inc.,* 282 NLRB No. 184 (1987), the NLRB decided, for administrative convenience, to abandon this view of the legislative history. Less than two years after *Deklewa,* the NLRB has likewise abandoned the reasoning behind *Deklewa* in the case of *Laborers' Local Union No. 1184 (NVE Constructors, Inc.),*

296 NLRB No. 165 (1989).[2] Although it is raised in the context of a trust fund lawsuit under Section 301 of the Act, the Court of Appeals for the Ninth Circuit has overruled existing Circuit Court cases and applied the NLRB's view of section 8(f) instead of the Supreme Court's view.[3] The Court must preserve the balance of power between the executive, legislative and judicial branches of government, and remind the agency and Court of Appeals that due process of law includes the principles of *stare decisis*

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[2] As will be set forth later, the NLRB erred in its reasoning in support of the *Deklewa* decision. The first part of the *Deklewa* decision describes well the subsidiary rules and policies developed as a result of the Supreme Court's decision in *Higdon*. In *Deklewa*, the Board found it intellectually difficult to justify a presumption in favor of majority status from the mere passage of time or from the use of exclusive union hiring halls, trust fund benefits, or forced union membership. This lead to the result that all construction agreements which are not supported by card based or other independent pre-signing indications of majority status remain section 8(f) pre-hire agreements until and unless the union wins in an NLRB conducted election or is voluntarily recognized based upon independent evidence of majority status. However, this does not make pre-hire agreement non-voidable, it does not create temporary fictitious 9(a) relationships and it does not mean the Supreme Court's opinions in *Higdon* and *McNeff* can be ignored.

[3] A further reason not to apply *Deklewa* in the context of this section 301 suit is that the Board itself would not and could not apply its decision to the facts of this case. The Board held that *Deklewa* would apply only "to this case and to all pending cases in whatever stage." *Deklewa* at 1389. This case is not now, nor could it ever be, presented for adjudication to the Board. The Board could not accept an unfair labor practice charge under section 8(a)(5) because the six-month statute of limitations has run. NLRA section 10(b) [29 U.S.C. § 160(b)].

and the power of higher courts to mandate to lower courts the outcome of decisions based upon clear rules of precedent. Otherwise, the principle of jurisprudence becomes the mere political whim of the most recent judicial or administrative official to deal with the problem.

McNeff Was A Trust Fund Case In Which The Supreme Court Did Not Defer To Any Agency Ruling. Likewise, In Trust Fund Cases, A Federal Court Owes No Duty Of Deferral To The NLRB, Especially When The Board Rewrites The Act In The Name Of Administrative Convenience Instead Of Interpreting Congressional Intent.

The Court owes no deference to an agency which attempts to engage "in the unauthorized assumption . . . of major policy decisions properly made by Congress." *American Ship Building Company v. NLRB*, 380 U.S. 300, 318 (1965). It is the responsibility of the Court authoritatively to construe statutes, and to reject an agency interpretation which is contrary to congressional intent. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-844 (1984); *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). The agency is subject to even greater scrutiny when it abruptly departs from precedent. *NLRB v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO ("Higdon")*, 434 U.S. 335, 351 (1978); *Lovshin v. Department of the Navy*, 767 F.2d 826, 840 (D.C. Cir. 1985), *cert. denied.*, 106 S.Ct. 1523 (1986); *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325, 1330 (11th Cir. 1983); *NRDC v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982); especially so precedent set by the Court.

Judge Kozinski, in his eloquent dissent to the decision of the Ninth Circuit *en banc*, excerpts from which follow, presented the issue directly.

> "It is emphatically, the province and duty of the judicial department, to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803). To MARBURY's ringing pronouncement the majority would add a codicil: "until and unless the agency charged with administering the law changes its mind." According to the majority, if a federal court relies on an agency's interpretation of a statute, the court's construction is binding only until the agency decides the statute means something else altogether. At that point the court, or a higher court, or a lower court, may – nay, must – follow the agency's new interpretation unless that interpretation is unreasonable. This, I respectfully suggest, results in a significant shift of authority from the judiciary to the executive branch. Whenever Congress charges an agency, board, commission or department with administering a statute – I would venture to guess that this includes a substantial majority of our most significant federal laws – the judges become the handmaidens of the agency, relegated to deciding not what the law is, but only whether the agency's construction of the law is reasonable.
>
> This is no small change. Courts and agencies are fundamentally different, both institutionally and functionally. Judicial decision making is hedged about with a variety of constitutional safeguards designed to protect it from manipulation by the political branches. In interpreting statutes, courts are bound to find and apply the meaning endowed them by Congress and the President. It is emphatically not the function of courts to read policy content into statutes, or to interpret them in a way that will

foster a particular political viewpoint. Administrative agencies, by contrast, are designed to bend with the political winds. The leadership and policy direction of executive departments change with every administration; members of so-called independent agencies are appointed with reference to their political affiliations. Agency officials are expected to rely on their views of public policy in carrying out their responsibilities.

Because judges must read a statute in the way that best reflects its meaning, courts are far slower than agencies in overruling their decisions. Once a circuit interprets a statute, only an en banc panel of the same court or the Supreme Court may adopt a different construction; only the Supreme Court may modify or reverse its own prior construction of a statute. By contrast, agencies can change their outlook as often and easily as a chameleon changes its color. A change of administration may prompt an executive department to alter its position on a particular piece of legislation overnight. As positions taken by a regulatory agency may hinge on a narrow majority, appointment of a single commissioner may drastically change the agency's approach to its organic statute.

This difference between the constraints on the judiciary and the broad freedom afforded agencies derives directly from the disparate functions they perform. When courts interpret a statute, they search for its true meaning – and there can never be more than one true meaning. To be sure, reasonable minds may differ as to what that meaning may be; occasionally it may be necessary to correct a judicial decision that misreads that meaning. But in performing their proper function, judges must listen for the voice of the legislature, not to the sound of their own heartbeats. Because courts are bound by the best

construction of the statute, they may alter their interpretation only in response to a powerful new insight as to the law's meaning, not because a different panel of judges prefers a different result.

Agencies, on the other hand, may turn on a dime: Their proper function is to fill in policy gaps pursuant to an explicit or implicit delegation of authority from Congress. See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974) ("[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress"). Where Congress has delegated such authority, the statute becomes a clear vessel which changes its tint as it is filled and refilled by various policy pigments. Because the agency administering the statute is not bound to a single formulation of statutory language, it may make changes without considering whether the new approach more accurately reflects the meaning of the statute.

Both types of decision making processes serve a vital function so long as each is confined to its own sphere. The majority goes astray in conflating the two. This error has the effect of displacing the courts' methodical, deliberate search for a law's meaning with the policy judgment of a politically responsive administrative agency. This is troubling both as a jurisprudential and as a practical matter.

Jurisprudentially, I am troubled by the majority's implicit holding that the meaning of a statute can change in an instant simply because an administrative agency has said so. Statutory meaning is not a matter of hopes or wishes; it is a fact. In settling on a particular interpretation

of a statute, the court is saying: "This is the meaning that was actually conferred upon this statute by Congress." In reaching that conclusion, the court looks first at the statute's language and structure, but may also rely on the statute's legislative history and the view of the agency charged with its enforcement. A change in the agency's view alters this calculus and may motivate a reviewing court to reconsider the soundness of its prior interpretation. But a change in an agency's position cannot automatically alter the meaning Congress gave the statute years earlier.

By reaching the contrary conclusion, the court is, in effect, holding that statutes have no fixed meaning, that in passing laws Congress approves a range of possible interpretations, each as good as the next. While this approach fits in neatly with the popular mythology, conceived and nurtured in legal academies, that words are incapable of conveying precise concepts, it "undermines the basic principle that language provides a meaningful constraint on public and private conduct." *Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988). Needless to say, I disagree with this approach which, in my view, represents a serious abdication of judicial responsibility.

[FN 2] A reassuring inconsistency suggests the majority is not entirely comfortable with its own prescription: Specifically, the majority goes to great pains to demonstrate that Deklewa's interpretation of section 8(f) is not merely permissible, but preferable. Majority opinion at 1132-34. Thus, the court observes that "Deklewa's literal reading of the second proviso [of section 8(f)] is a more likely reading of congressional intent than that given by R.J. Smith," *Id.* at 1132 (emphasis added), and concludes that "[t]he Board's prior rule, allowing repudiation

of such agreements in addition to these explicit statutory protections, has proved unwise." *Id.* at 1133. Such ruminations have no legitimate place within the analytical framework adopted by the majority: If we are bound to follow the Board, we must approve even a poor interpretation of the statute, so long as it falls within the range of permissible meanings. Future courts might be wise to note the majority's concern with what "best serves the interests of employers and employees," id. at 1129, and then do as we do, not as we say.

And this brings me to the practical problems wrought by today's decision. The en banc court's ruling – should it become the law of the land – will make hundreds, perhaps thousands, of laws that have been conclusively interpreted by the courts subject to uncertainty whenever there is a shift in the political winds. A brief survey of recent cases in which the Supreme Court has relied on an agency's interpretation suggests the scope of the problem. (citations omitted) . . . Our circuit has deferred to agency construction of statutes in an equally wide range of cases (citations omitted) . . .

This handful of examples barely hints at the scope of the problem created by today's decision. If deference means blind adherence to the agency's construction as it meanders through the range of non-irrational meanings, federal judges should plan to take a long holiday and observe from afar as the body of federal law develops without their further meaningful input. A change of this magnitude in the relationship between the judicial and executive branches of government should come from the Supreme Court, if it comes at all.

The Board Has Not Construed Section 8(f), It Has Rewritten It

Section 9(a) of the National Labor Relations Act is the equivalent of a Bill of Rights for collective bargaining. It applies, by its terms, after employees have, "by a majority of the employees in a unit appropriate for such purposes" chosen a representative to bargain for them collectively. Section(s) 8(a)(5) and 8(b)(3) of the Act guarantee the freedom to make that choice by identifying coercive or bad faith conduct by both union and employer.

Contracts executed pursuant to section 8(f) of the Act are different from section 9(a) collective bargaining agreements. *Retail Clerk's Int'l Assn. v. Lion Dry Goods*, 369 U.S. 17, 27, 35 (1962). In enacting section 8(f) of the Act, Congress fashioned a limited exception to the principle of employee free choice enforced by sections 8(a) and (b) of the Act. Thus, section(s) 8(a)(2) and (5) forbid an employer from entering into a union agreement without prior evidence of employee support. Section 8(f) validates this otherwise unfair labor practice by permitting an agreement to be reached on a pre-hire basis, *e.g.* before any evidence of union support. In so doing, the Congress clearly indicated that such an agreement must be "purely voluntary" and free of coercion. Unless confirmed by evidence of majority support, pre-*Deklewa* section 8(f) contracts were considered purely executory and repudiable at any time.

In implementing the Congressional mandate represented by section 8(f), the Board considered that the

shifting nature of the construction workforce made elections or a showing of cards, the traditional means recognized in the Act for a demonstration of majority support, impractical. Accordingly, the Board fashioned two additional devices to make employee choice possible. Thus, the doctrines of conversion and merger serve to provide the equivalent of an election by allowing proof that an employer's workforce has the permanent and stable characteristics of a non-construction employer; or if the underlying contract is executed through a multi-employer group, that a overall majority exists in favor of the union, and therefore, the 8(f) contract is considered merged into the larger whole.

Repudiation, merger and conversion were, until *Deklewa*, entrenched and unchallenged Board law. The only controversy was when a merger or conversion occurred. The concepts required an employer to "chart" its workforce, job-by-job and look for a statistically significant portion of employees working on more than one jobsite successively. The trial court in *Mesa Verde* was able to perform this task quite easily. See *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 598 F. Supp. 1092, 1097-1099 (N.D. Cal. 1984). Not only are the "rules" of then existing Board law on merger and conversion set forth clearly in the first pages of the *Deklewa* decision, but they were widely published and understood by the labor law community. Job-site by jobsite employers could repudiate for future jobs only, unless they merged their workforce into the multi-employer group's workforce. *See, e.g., Baton Rouge Building Trades Council v. E.C. Schaffer*, 657 F.2d 806 (5th Cir. 1981); Thierman & Pattison, *Lowest Responsible Bidder*,

(1985). These rules have been adopted by the Court, under the mandate it itself laid out in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as permissible constructions of the Act.

The *Deklewa* rule abandons the doctrines of repudiation, merger and conversion. In their stead, the Board has altered the mechanisms by which elections may be sought under the Act, by concluding that the contract bar rule does not apply, and therefore employers may call for decertification elections at any time without showing proof of employee dissatisfaction with the union. This is a useless slight of hand, since the union is by definition a minority representative and existing Board law before *Deklewa* allowed an employer to file a petition for an election anytime anyway. See *Albuquerque Insulation Contractor*, 256 NLRB No. 15 (1981)[4]

In *Deklewa*, the Board abandoned the statutory construction it had urged before the Supreme Court in *Higdon*, and held that, in all respects, 8(f) agreements are fully enforceable by Section(s) 8(a)(5) and 8(b)(3), as are traditional collective bargaining agreements under the Act.[5] The NLRB also implied in *Deklewa*, that unions

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[4] The pre-*Deklewa* reason for an employer to file for an election was that then the NLRB would make the initial determination that the contract was a pre-hire agreement and no conversion or merger had occurred. The Union could always file an unfair labor practice charge if it believed the contract was not a pre-hire agreement.

[5] This position is somewhat disingenuous as to unions who decide to "disclaim" and then renounce the section 8(f)

(Continued on following page)

could not picket to obtain an employer's signature to a pre-hire agreement, since pre-hire agreements had to be voluntarily entered into, although in a more recent decision, the Board has retraced its steps on that point, limiting issuance of complaint under section 8(b)(7), in contradictory fashion, to situations where there are no unit employees or the picketing for a pre-hire agreement has exceeded 30 days. See *NVE Constructors, Inc., supra.*

The Board's pronouncement in *Deklewa*, that section 8(f) contracts are no longer (or were never) repudiable, and that henceforth pre-hire agreements will be enforced during their term under section(s) 8(a)(5) and 8(b)(3) without regard to whether the union actually achieves status under section 9(a) as the majority representative contradicts the plain language of the statute. Section 8(f) provides that "it shall not be an unfair labor practice under subsections (a) and (b)" for a construction industry employer to enter into an agreement with a union whose majority status has "not been established under the provisions of section 9 of this Act *prior to the making of such agreement. . . .* " *See also* S. Rep. No. 187 at 55, 1 Leg. Hist. 451; H. Rep. 741 at 50, 1 Leg. Hist. 808 (emphasis added). (Section 8(f) "[m]akes clear that it is not an unfair labor practice for an employer . . . to *enter into* [pre-hire agreements] . . . without the union's majority status having

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agreement. The NLRB still believes the relationship between a union and the employees to be such a critical element of the collective bargaining relationship that the union that does not "represent" employees can repudiate. Moreover, 8(f) agreements, even after *Deklewa*, are not binding on employers without employees. See e.g., *Stack Electric*, 290 NLRB No. 73 (1988).

been established. . . . "). Nothing in section 8(f) intended pre-hire agreements to be enforced in the same manner as collective bargaining agreements under section 9(a).[6]

Just a few years ago, the NLRB believed that Congress wanted pre-hire agreements to be purely voluntary and "at will" for the duration of a jobsite or until the union became the majority representative of employees. The NLRB and the courts were keenly aware of the power of construction unions to engage in top down organizing. Congress having legitimized the industry practice of union only projects through the construction industry proviso to section 8(e), the NLRB developed the law of pre-hire abrogration to prevent contracts of adhesion and to avoid trying issues of fraudulent or coercive inducement. *See Woelke and Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1981). In its brief to the Court in *Higdon*, the

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[6] A more plausible holding, consistent with the decisions of the Court and the legislative history, would affirm Congress' intent that all contracts in the construction industry are considered pre-hire and "at will". Let the union that seeks the benefit of a section 9(a) relationship come forward to file for an election. The Board's pre-*Deklewa* position is similar to the common law concepts of capacity to contract. A minor, who lacks the legal capacity to contract, can void any contract, but can continue to receive goods and services as long as the minor pays for goods and services already received. In the pre-hire context, the union lacks the capacity to enter into a binding contract, but the employer must honor the contract for the job or project, and must continue trust fund contributions until notice is given to prevent third party reliance. *Deklewa* has created a fictitious capacity in a minority union to enter into binding contracts not envisioned in the Act, permitting them an unequal bargaining position in establishing a permanent relationship with an employer.

General Counsel emphatically affirmed that the statute, as written, compelled the Board's result: section 8(f) did not create 9(a) rights.

> [T]he issue in [*Higdon* is] whether Section 8(f) itself establishes that a union signatory to a pre-hire agreement shall be deemed by operation of law to be the recognized bargaining representative of all employees subsequently hired *until the agreement expires or the union is ousted by an employer – initiated board election.* As we demonstrate below, *neither the language of section 8(f) nor its legislative history supports that conclusion,* or in any way suggests that Congress intended so sweeping a qualification of the Act's major premise that employees shall be represented by bargaining agents of their own choosing. [Br. of the Board in *Higdon,* pp. 18-19.]
>
> *Nothing in the language of Section 8(f),* however, suggests that it was designed to confer upon a union that is a party to a pre-hire agreement the kind of representative status that *would support a Section 8(a)(5) bargaining order against an employer* who refused to bargain with it. . . . *Indeed the language and structure of the Act suggests precisely the opposite.*
>
> Significantly, Congress in 1959 did not, in section 8(f) or elsewhere modify section 8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a)*" [emphasis in original]. [*Id.* at 22-23.]
>
> In short the language of section 8(f) and its relationship to other provisions of the Act reflect that *section 8(f) was not intended to relive unions that are parties to pre-hire agreements from the obligation to achieve majority support before they can require an employer to honor such an agreement*

> *by means of section 8(a)(5). . . . [Id.* at 23-24] (emphasis added).

For many years, union advocates have urged Congress to alter the special character of 8(f) contracts to make them instantly enforceable, upon execution. In *Deklewa*, as affirmed in *Mesa Verde*, the Board did what the Congress would not. Indeed, just this point was made to the Court by the General Counsel in *Higdon:*

> The legislative history of Section 8(f)) confirms that Congress did not intend its authorization of prehire agreements in the construction industry to confer automatic representative status or to obviate the union's obligation to acquire majority support. Congress rejected a proposal that would have permitted the Board to certify a union signing a prehire agreement as the employees' representative without an election or other proof of majority support merely upon a showing of a history of bargaining between the union and the employer. [*Id.*] [See Section 702 of H.R. 8400, 86th Cong., 1st Sess., 1 Leg. Hist. 678-79 (1959); 105 Cong. Rec. 6431, 15, 541-42, 17, 899, 18, 135 (1959)].

The effort continues in Congress to this day. See e.g., H.R. 281, 100th Cong., 1st Sess. That, it is submitted, is where it belongs.

Only An En Banc Panel Of The Court Should Have The Ability To Alter Established Circuit Precedent In Order To Ensure The Stability Of Our Laws And Reduce Unjustified Appeals, And The NLRB Is Not Entitled To Any Special Exemption.

The Ninth Circuit has long held that a decision of a three judge panel may only be reversed en banc. "[U]nder the long standing practice of this court, a panel may not overrule a prior decision." *Charleston v. United States*, 444

F.2d 504 at n. 3 (9th Cir. 1961) (citing 9th Cir. Rule 23, 28 U.S.C.). A majority of other circuits have followed the same practice. *See* En Banc Proceedings, 37 ALR 274, §5. (Second, Third, Fourth, Fifth, and District of Columbia Circuits.)

The en banc panel has now unwisely departed from this principle, known in the Circuit as the *Royal Development* rule. (*Royal Development Co. v. NLRB*, 703 F.2d 363, 369 (9th Cir. 1983)), *citing NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135 (5th Cir. 1973), *rev'd*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). This departure is particularly unsound with regard to Circuit decisions adopting or rejecting Board law in the typical case because the Circuit court functions as a court of first resort for the purposes of judicial review. In actions arising, as does this one, under section 301, the trial court exercises its original jurisdiction in interpretation of the Act in the enforcement of collective bargaining agreements, subject to the consent of the Circuit. As the Ninth Circuit observed in *Royal*, this jurisdictional mandate is consistent with sound

> [p]olicy reasons for refusing to adopt a Board decision that conflicts with our earlier precedent absent an en banc convening of the court. In effect, the Board would be free to "reverse" circuit decisions whenever its membership changed, thus relegating the courts of appeal to a minor supervisory role over the Board. This, we believe, would be inconsistent with our legislative process.
>
> *Id.*, 703 F.2d at 368.

The fundamental error in *Mesa Verde's* adoption of *Deklewa* is that it is premised on a false belief that the

Board may alter the rights created by the Act in discharging its duty to implement and interpret. The historical charge of appellate courts, identified so clearly by Judge Kozinski, is to isolate and correct such errors. Facilitating their commission by permitting a variation of the en banc rules invites a compromise of the essential guarantee of justice which the Court exists to preserve.

CONCLUSION

For the above stated reasons this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1990

APPENDIX A

SUBCHAPTER IV – LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer –

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents –

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as

the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

§ 159 REPRESENTATIVES AND ELECTION

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

§ 160 PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the

United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-b, 723-C).